Supreme Court, U.S.
FILED
JUL 31 2006
OFFICE OF THE CLERK

No. 06-167

In The
Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN,
ANTHONY P. KANE, H. WILLIAMS,
D.A. DACANAY, AND I.A. NIENHUIS,

Petitioners,

v.

ROMIRICO REMEIDIO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can an inmate proceed on a civil-rights claim that prison officials retaliated against him for First Amendment expression if the action taken against the inmate objectively served a legitimate penological purpose?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jeanne S. Woodford, Dewey Wooten, Anthony P. Kane, H. Williams, D.A. Dacanay, and I.A. Nienhuis – who are current and retired employees of the California Department of Corrections and Rehabilitation – respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1-4) is unpublished but reported at 173 F. App'x 636. The district court's opinion granting summary judgment (App. 5-32) is also unpublished but available at 2004 WL 1635561.

JURISDICTION

The court of appeals entered judgment on April 5, 2006 (App. 1) and denied a timely petition for rehearing on May 1, 2006 (App. 33). This Court may exercise jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which is applicable to the States through the Fourteenth Amendment, *Bigelow v. Virginia*, 421 U.S. 809, 811 (1975), states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the

people . . . to petition the Government for a redress of grievances."

STATEMENT

The Respondent, Romirico Remeidio, is a former inmate from San Quentin State Prison, who contends that various prison officials retaliated against him for his First Amendment expression. Specifically, he alleges that after he complained about the prison's College Program, officials searched his cell and found prohibited gambling and pornographic materials, and that this discovery led to disciplinary action against Mr. Remeidio, the eventual denial of his parole, his confinement in administrative segregation, and transfer to another prison. (App. 5-11.)

The complaint, which was filed under 42 U.S.C. § 1983, alleged retaliation, due-process, and equal-protection claims. (*Id.* at 14-15.) The retaliation claim alleged only that the search and administrative segregation were retaliatory. (*Id.* at 21.) The complaint demanded compensatory damages, punitive damages, and declaratory and injunctive relief, including expungement of all adverse reports from Mr. Remeidio's prison central file.

A. The Cell Search and Eventual Disciplinary Action Stemmed from an Investigation into Illicit Activities Among Inmates in the College Program.

San Quentin's College Program allows volunteers to enter the prison and provide college-level courses to inmates. In 2001, Defendant Nienhuis, the former Community

Resource Manager at San Quentin, learned of conflict that was developing among some inmates, volunteers, and the program's coordinator about the leadership and direction of the program. (App. 5-6.)

As Mr. Nienhuis looked into the issue, several members of the College Program expressed concern to him about the program's stability and safety, and that some inmates may have been creating conflict within the College Program. (*See id.* at 6.) In particular, Mr. Nienhuis learned that inmates may have been trying to change the nature of the program and remove its coordinator in order to gain freer access to the program volunteers and thereby engage in illicit activity with them. (*Id.* at 6-7.)

Mr. Nienhuis was also aware that two inmates involved in the College Program were previously investigated for fostering inappropriate romantic relationships with volunteers in other prison programs. (*Id.*) After reviewing a proposal by several inmates within the College Program, including Mr. Remeidio, that used harsh and discrediting language regarding the College Program coordinator, Mr. Nienhuis began working with San Quentin's Investigative Services to determine if any unauthorized or illegal activities were occurring within the College Program. (*See id.*)

With the consent of San Quentin's warden at the time, Jeanne Woodford, Mr. Remeidio's cell was searched and documents were seized. (*Id.* at 7.) When Mr. Nienhuis reviewed the documents, he found no evidence that Mr. Remeidio was engaging in illicit activity connected to the College Program. But he did find gambling materials, hardcore pornographic photographs depicting bestiality, and several loose magazine pages of other hardcore

pornography. (*See id.* at 7-8.) All of these items are contraband under prison regulations. (*Id.* at 8.)

Before the cell search, Mr. Remeidio had been recommended for parole. (*Id.* at 7.) Following discovery of the prohibited materials, a classification committee headed by Defendant Dacanay anticipated that if Mr. Remeidio was denied parole because of the contraband, he might react unfavorably and create a security threat as a possible escape risk. (*Id.* at 8.) Thus, the committee placed him in administrative segregation pending the disciplinary charges. (*Id.*)

Eventually, Mr. Remeidio was only reprimanded for possessing gambling materials after the rules-violation charge was reduced to a "counseling chrono" (*id.* at 11), but he was found guilty of a prison-rules violation for possessing the pornography (*id.* at 8.) His parole was denied (*id.* at 10), and out of continuing concern that he might pose a security threat, a classification committee headed by Defendant Kane recommended that Mr. Remeidio be retained in administrative segregation and considered for transfer to a more-secure prison (*id.* at 10.) Later, Defendant Wooten headed a classification committee that also recommended transfer to another prison, citing Mr. Remeidio's two disciplinary charges within recent months, the parole denial, possible future parole denials, and San Quentin's lack of modern security features. (*Id.*)

Although Mr. Remeidio was not personally linked to improper activity within the College Program, the investigation uncovered threats to San Quentin's security caused by prohibited activities between program volunteers and two other inmates, Mike Viet Ngo and Eddy Zheng. (*See*

id. at 9-10.) According to the record, officials found that Mr. Ngo was involved in an illicit romantic relationship with a female volunteer, both of whom shared violent ideologies that advocate governmental overthrow. In their correspondence, the two spoke of revolution and effecting change through violence. The volunteer spoke of whether she had "resolve to hold the gun," and Mr. Ngo believed that he would be killed while in prison. The officials also found that Ngo and the volunteer smuggled items through prison security, as did Mr. Zheng and another female volunteer.

B. The District Court Granted Summary Judgment on the Retaliation Claim, but the Ninth Circuit Reversed, Holding that Regardless of the Legitimate Bases for the Action Against Mr. Remeidio, Summary Judgment Was Improper Because of a Dispute Over the Officials' Motivation.

The district court granted summary judgment to the officials on all of the claims, including retaliation, based on the above facts. (App. 31.) As to the retaliation claim, the court noted that officials are entitled to appropriate deference concerning their asserted legitimate penological reasons for conduct alleged to be retaliatory. (*Id.* at 22.) Finding that Mr. Remeidio failed to show that there was "no legitimate penological objective to defendants' actions," the court ruled that the retaliation claim failed as a matter of law. (*Id.* at 22-23.) Further, the court reasoned that the officials provided significant evidence that the search advanced legitimate penological goals. (*Id.* at 23-24.) And it held that although Mr. Remeidio presented some evidence that "may tend to support defendants' intent to retaliate," the officials showed that the administrative

segregation and later transfer "were made pursuant to legitimate penological goals."

On appeal, the Ninth Circuit affirmed summary judgment on the due-process and equal-protection claims but reversed on the retaliation claim. (*Id.* at 1-4.) The court specifically confirmed that the "defendants were within their rights to search Remeidio's cell," but held that summary judgment was improper because there was a dispute over the officials' actual motivation for their conduct. (*Id.* at 2.) As the court noted, Mr. Remeidio contended that no other inmate was similarly punished for possession of similar contraband or had been placed in administrative segregation after a denial of parole. (*Id.*) Further, the verified complaint alleged that before the contraband was discovered, Mr. Remeidio's correctional counselor told him that he would be transferred because he complained about the College Program. (*Id.*) Although the court conceded that the evidence of improper motive may be of limited force, it was enough to create a dispute of material fact about motive. (*Id.*) Thus, in line with the Ninth Circuit's retaliation precedent, the court held that summary judgment could not be granted. *See Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003) (holding that summary judgment on a prisoner's retaliation claim is improper if there is a dispute over the official's motive).

In addition, the Ninth Circuit ruled that the officials could not receive qualified immunity. (*Id.* at 2-3.) Rather than examining whether a reasonable official in Defendants' position could have believed that the conduct was lawful, the court held generally that retaliatory punishment is clearly unlawful within the Ninth Circuit. (*Id.* at

2-3.) It then remanded the case for further proceedings. (*Id.* at 3.)

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided on Whether an Inmate's Retaliation Claim Is Defeated by Objectively Legitimate Penological Goals for the Adverse Action, and If Not, What the Proper Standard of Pleading and Proof Is for Deciding the Claim.

There is conflict among the circuits over the proper standard for deciding a prisoner's retaliation claim when the defendant-official's subjective motive is disputed. First, the circuits disagree about whether a retaliation claim is defeated if the official puts forth an objectively legitimate reason for taking adverse action against the inmate. Second, the circuits that allow a claim to proceed despite an objectively legitimate reason disagree over what standards of pleading and proof apply to establish a retaliatory motive.

The Eighth Circuit focuses on whether the action against the inmate was objectively legitimate, and not on any dispute over the officials' subjective motive, when considering retaliatory-discipline cases. *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994). The court holds that such claims fail if the disciplinary action is objectively legitimate. *Id.* (stating that an adequate evidentiary basis for a disciplinary conviction "essentially checkmates" the claim); *see also Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990) (holding that "no claim can be stated when the alleged retaliation arose from discipline imparted for

acts that a prisoner was not entitled to perform"). And to be objectively legitimate, the conviction must simply satisfy the some-evidence test under *Superintendent v. Hill*, 472 U.S. 445, 454-56 (1985), which holds that disciplinary findings satisfy due-process standards if they are supported by some evidence. As the Eighth Circuit explains, applying any other rule would allow a prisoner to file an inmate grievance or lawsuit, "openly flout prison rules," and then file suit under § 1983 alleging that the prison officials disciplined him in retaliation. *Orebaugh*, 910 F.2d at 528.

The Second Circuit declines to apply such an approach. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996). The court reasons that an objective inquiry like the some-evidence test does not fit into the analysis of a claim that concerns subjective motivation. *Id.* Of course, this reasoning assumes that a prisoner who brings a retaliation claim need not show both improper subjective motive and a lack of an objectively legitimate penological interest. Whether the latter must be shown is the question presented here.

The Ninth Circuit has vacillated between the Eighth and Second Circuit's approaches. Generally, the Ninth Circuit holds that the objective some-evidence test does "not apply to retaliation claims." *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003). Thus, in a case alleging retaliation because an inmate was classified as a gang member and placed in administrative segregation, the court held that the inmate was entitled to proceed to trial as long as there was a dispute over the officials' intent, "even though [the inmate] may have *arguably* ended up where he belonged." *Id.*

In other cases, however, the Ninth Circuit has given at least some of the defendants the benefit of an objective-legitimacy inquiry. For example, the court held in a case alleging retaliatory reclassification that the officers were entitled to judgment because there was some evidence to support the reclassification, which "served the legitimate penological purpose of maintaining prison discipline." *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994). And in a retaliatory-discipline case, the court held that a disciplinary-board member was entitled to judgment as a matter of law after trial because there was evidence to support the guilty finding, but that the officer who brought the same charge was not entitled to judgment. *Hines v. Gomez*, 108 F.3d 265, 268-70 (9th Cir. 1997). The court's only explanation for this distinction was that a disciplinary board is required to provide inmates due-process protections like notice and a hearing, which apparently help to prevent retaliation, but the charging officer need not provide such protections. *Id.* at 268-69.

Other circuits also allow an inmate to proceed on a retaliation claim despite the existence of objective legitimacy, but there is a further split over the standards of pleading and proof to determine whether the official was actually motivated by retaliatory animus. As previously discussed, the Ninth Circuit allows the inmate to proceed to trial as long as there is a dispute over motivation. *Bruce*, 351 F.3d at 1289. Other circuits – the Second, Third, Sixth, and Seventh – follow the standard used in employment-retaliation cases, as set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996). Under

this standard, the inmate must first raise an inference that the protected conduct was a substantial or motivating factor for the adverse action. *Graham*, 89 F.3d at 80. Then the burden shifts to the official to show that he *would have* taken the same action absent the protected conduct. *Id.* The Eighth Circuit criticizes the application of *Mt. Healthy* to prisoners' retaliation cases, noting that *Mt. Healthy* was not a prison-retaliation case, *Goff v. Burton*, 7 F.3d 734, 738-39 (8th Cir. 1993), and that its application in the prison context allows an inmate to disobey prison regulations and then file suit when he receives the discipline he deserves, *Orebaugh*, 910 F.2d at 528.

The rest of the circuits to address the issue – the First, Fifth, and Tenth, along with the Eighth in relation to retaliatory-transfer cases – decline to apply the *Mt. Healthy* test for prison-retaliation cases and have adopted a "but for" test. *Layne v. Vinzant*, 657 F.2d 468, 475 (1st Cir. 1981); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995); *Cornell v. Woods*, 69 F.3d 1383, 1388-89 (8th Cir. 1995); *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998). These circuits, in apparent recognition of the burden that retaliation suits impose on prison officials, place on the inmate the burden of showing that the official would not have taken the adverse action "but for" the protected conduct. *E.g., Layne*, 657 F.2d at 475.

II. The Circuits that Allow a Prisoner to Challenge an Objectively Legitimate Action As Retaliatory Are in Conflict with *Turner v. Safley* and Out of Step with *Hartman v. Moore*.

Because this Court has held that a restriction on an inmate's First Amendment rights is legitimate as long as it is objectively reasonable, inmates should not be able to

challenge objectively legitimate conduct as retaliatory. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Court balanced its competing goals of protecting inmates' constitutional rights and providing substantial deference to prison administrators' professional judgment, by holding that burdens on inmates' fundamental rights are constitutional if they are "reasonably related to legitimate penological interests." Key to this inquiry is whether there is "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* This consideration does not analyze the official's subjective motive, but whether there is a "*logical connection* between the regulation and the *asserted goal*." *Id.* (emphasis added).

Thus, if an official accused of retaliation can put forth a legitimate basis for taking adverse action against an inmate, and that basis is *logically* connected to the action, the official should not be burdened by a retaliation suit simply because the inmate challenges the officer's motive. As this Court recognized in *Hewitt v. Helms*, 459 U.S. 460, 474 (1983), the prison atmosphere is a volatile one, with ever-present safety and security threats. Prison officials should not be deterred from making objectively reasonable decisions, which may have important safety and security implications, because they are fearful that their action may be construed as retaliatory, subjecting them to burdensome litigation. Because it is all too easy for a prisoner to claim retaliatory motive, and even present circumstantial evidence of one, but very difficult for an officer to conclusively refute such claims, *Turner*'s objective reasonableness standard should apply to prisoners' retaliation claims.

This Court's recent decision in *Hartman v. Moore*, 126 S. Ct. 1695 (2006), also counsels that objective legitimacy

should be sufficient to defeat a prisoner's retaliation claim. *Hartman* holds that a plaintiff who alleges that governmental officers induced criminal charges out of retaliation must plead and prove an absence of probable cause. *Id.* at 1707. This decision is based on two factors with ready analogies to the prison context.

First, *Hartman* explained that in retaliatory-prosecution cases, there is a "distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 1704. Likewise, in the prison context, records exist to prove whether there was an objectively legitimate basis for the action taken against the inmate. Prisons regularly document both monumental and mundane events concerning inmates. And because of the Prison Litigation Reform Act's administrative-exhaustion requirement, 42 U.S.C. § 1997e(a), inmates cannot bring a claim to court without first exhausting available administrative remedies – a process that typically documents any legitimate basis for the action about which the inmate complains.

Second, *Hartman*'s decision was based on the "presumption that a prosecutor has legitimate grounds for the action he takes." *Hartman*, 126 S. Ct. at 1706. In the prison context also, an official's decision is entitled to a high presumption of legitimacy. *Turner*, 482 U.S. at 84-85. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* When state prisons are involved, deference is further required under federalism concerns. *Id.* at 85.

Thus, the rationale of both *Turner* and *Hartman* dictate that prison officials should not be held to answer a retaliation suit for objectively legitimate conduct. In line with these decisions, an inmate alleging retaliatory action should be required to allege and prove that the adverse action did not further any legitimate penological interest.

III. The Dispute Among the Circuits Potentially Impacts a Substantial Portion of the Federal Docket.

The issue in this case potentially affects a great number of cases before the federal judiciary. Over the last six years, inmates have filed an average of over 24,000 prisoner-civil-rights and prison-conditions suits against state and federal correctional officials. *See* Administrative Office of the U.S. Courts, Judicial Facts and Figures: U.S. District Court – Civil Cases Filed by Nature of Suit, Table 4.6 (2005), *available at* http://www.uscourts.gov/judicialfactsfigures/Table406.pdf. In 2005, there were 24,614 such cases, *see id.*, accounting for 9.7% of all civil cases nationwide, *see id.* Table 4.4 (noting that there were a total of 253,273 civil cases filed). In the Ninth Circuit, the percentage is even higher than the national average. In 2005, 16.5% of all civil filings in the Ninth Circuit were prisoner-civil-rights and prison-conditions cases. *See* Administrative Office of the U.S. Courts, Judicial Business of the United States Courts 2005, Table C-3 (Sept. 30, 2005), *available at* http://www.uscourts.gov/judbus2005/appendices/c3.pdf (showing that there were 6,890 civil prisoner suits against state and federal officials and a total of 41,662 civil cases).

Available statistics do not show the number of inmate cases that include retaliation claims. But whenever an inmate alleges some harm that is sufficient to state a constitutional violation, whatever the claim might be, he almost certainly has alleged sufficient harm for a retaliation claim. In fact, alleged retaliatory action need not independently violate the Constitution in order to be cognizable. *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Rather, an inmate need only show some adverse action that would chill an inmate of ordinary firmness from exercising First Amendment rights in the future. *See, e.g., Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (citing cases from the Second, Sixth, Seventh, and D.C. Circuits); *Rhodes v. Robinson*, 408 F.3d 559, 568-69 (9th Cir. 2005). Thus, courts have allowed inmates to proceed on a variety of retaliation claims, relating to all aspects of prison life. *See, e.g., Marshall v. Knight*, 445 F.3d 965, 970-71 (7th Cir. 2006) (allowing inmate to allege claims that he was put on idle status from his prison job without pay, restricted from proper law-library access, denied educational and vocational opportunities, denied a transfer to minimum security, and celled with violent inmates); *Allen v. Thomas*, 388 F.3d 147, 150 (5th Cir. 2004) (holding that inmate could proceed on a claim that his typewriter was confiscated); *Davidson v. Flynn*, 32 F.3d 27, 30 (2d Cir. 1994) (holding that the plaintiff stated a claim by alleging that he was handcuffed too tightly); *Hall v. Sutton*, 755 F.2d 786, 788 (11th Cir. 1985) (allowing prisoner to proceed on a claim that his tennis shoes were confiscated).

Moreover, inmates frequently engage in First Amendment expression that might be construed as the

basis for adverse action. *See, e.g., Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997) (holding that evidence of an inmate's reputation for filing grievances was relevant to whether the officer had a retaliatory motive). Inmates file appeals to challenge their convictions, administrative grievances to address virtually every aspect of prison life, and lawsuits to contest their conditions of confinement. With such frequent First Amendment exercise, inmates will often be able to point to factors suggesting that an official might have had a retaliatory motive. *See, e.g., Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (holding that circumstantial evidence, such as the timing of events or disparate treatment of prisoners, is sufficient to demonstrate retaliatory motive).

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: July 31, 2006

Respectfully submitted,

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173 Fed.Appx. 636

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROMIRICO REMEIDIO, Plaintiff-Appellant, v. J. WOODFORD; et al., Defendants-Appellees.	No. 04-16427 D.C. No. CV-03-02212-SI MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding.

Argued and Submitted February 14, 2006.
San Francisco, California

(Filed Apr. 05, 2006)

Before: SILVERMAN, GRABER, and CLIFTON, Circuit Judges.

Romirico Remeidio appeals the district court's grant of summary judgment in his 42 U.S.C. § 1983 action against several California prison officials. We review the district court's decision *de novo*, drawing all reasonable inferences in favor of the non-moving party. *Porter v. California Department of Corrections*, 419 F.3d 885, 891 (9th Cir.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

2005). We affirm in part and reverse in part, and remand for further proceedings on the retaliation claim.

We conclude that summary judgment should not have been granted on the retaliation claim. To establish a First Amendment retaliation claim, a prisoner must show "that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals." *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003) (citation omitted). On the current record, there is a genuine issue of material fact as to whether the discipline imposed was retaliatory and not motivated by a legitimate correctional purpose. Even though the defendants were within their rights to search Remeidio's cell (which search led to the discovery of contraband), Remeidio's verified complaint asserts that no other inmate within his cell block has ever been similarly punished – in particular, issued a rules violation report – for the possession of such contraband. The complaint also contends that no other inmate serving a life sentence has been placed in administrative segregation when his parole date was rescinded. Although the persuasive force of Remeidio's assertions on information and belief might be limited, the defendants have offered no evidence to rebut these allegations, thus permitting an inference that the consequences he suffered were motivated in part by retaliation and not by legitimate penological concerns. Remeidio further alleges in his verified complaint that even before the contraband was discovered, his correctional counselor told him that he would be transferred because he had signed the College Program petition, thereby further bolstering the claim. The defendants are not entitled to qualified immunity for this claim, because "the prohibition against retaliatory punishment is 'clearly

established law' in the Ninth Circuit, for qualified immunity purposes." *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (citation omitted).

Summary judgment was proper on Remeidio's equal protection claim, which alleges that he was targeted because of his Asian background. To the extent that his claim alleges disparate treatment between himself and other inmates in his cell block, that claim fails, because he has not shown that the defendants' actions "result[ed] in members of a certain group being treated differently from other persons based on membership in that group." *McLean v. Crabtree*, 173 F.3d 1176, 1185 (9th Cir. 1999) (citation omitted). To the extent that his claim is based on disparate treatment among the petition signatories, that claim is also deficient because incriminating materials were not found in the cell of the non-Asian signatory. Therefore, Remeidio cannot show "that the defendant[s] acted with an intent or purpose to discriminate against him based upon his membership in a protected class." *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003).

The district court properly granted summary judgment on Remeidio's due process claim. This claim falls short because Remeidio has not shown that due process standards were violated. Although he claims that he was prevented from introducing documentary evidence at the hearing, *cf. Serrano*, 345 F.3d at 1077, he apparently only wanted to present the letter and envelope that contained the contraband. These documents would have apparently been used to show that prison staff inspected the contraband materials when they were delivered to Remeidio, and to demonstrate that the materials were not openly displayed. Because Remeidio had a chance to testify and thus

to make these points, the papers themselves would not have affected the outcome of his hearing.

Each party to bear its own costs.

AFFIRMED in part; REVERSED and REMANDED in part.

2004 WL 1635561

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROMIRICO REMEIDIO,	No. C 03-02212 SI
Plaintiff,	**ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**
v.	
J. WOODFORD, et al.	
Defendant.	(Filed Jul. 1, 2004)

ENTERED IN CIVIL DOCKET 7/2/04

Plaintiff Romirico Remeidio, an inmate at San Quentin State Prison, filed this civil rights complaint under 42 U.S.C. § 1983. Defendants move for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons set forth below, the Court GRANTS defendants' motions for summary judgment with respect to plaintiff's three causes of action.

BACKGROUND

Plaintiff Romirico Remeidio is a prisoner serving a life term following his 1981 conviction for second degree murder. Cattermole Decl. Ex. B. From July 15, 1993 to October 18, 2002, plaintiff was incarcerated at California State Prison, San Quentin, including the period June 11, 2002 to October 18, 2002 in which plaintiff was housed in administrative segregation. Cattermole Decl. Ex. C.

In the latter part of 2001, defendant Nienhuis, serving as Community Resource Manager, learned of a dispute between several supervisors and coordinators of the San

Quentin College Program. Nienhuis Decl. ¶ 3(A), Ex. A at 2. Nienhuis learned that the former coordinator of the College Program, Janowitz, was attempting to replace the current program through Patton College with another program. *Id.* Furthermore, Nienhuis was informed that inmates may be encouraging this dispute. *Id.* Plaintiff disputes use of the term "conflict" and whether Janowitz was attempting to have the College Program replaced. Opp'n at 1.

During January of 2002, Lewen, the coordinator of the College Program at the time, discussed with Nienhuis the rights of prisoners to correspond with volunteers of the College Program. Nienhuis Decl. ¶ 3(D), Ex. A at 2-3. It became apparent to Nienhuis that some inmates wanted to change the program to allow more interaction between the program volunteers and inmates. *Id.* Nienhuis advised Lewen that more interaction between inmates and volunteers was not appropriate due to safety concerns. *Id.*

During the week of April 29, 2002, Educational Officer Davis and Academic Teacher DeArteaga discussed their concerns with Nienhuis about the College Program. Nienhuis Decl. ¶ 3(C), Ex. A at 3-4. Their concerns focused on a list of demands some inmates made at a College Program meeting. *Id.* During the week of April 29th, Nienhuis also met with Lewen. Nienhuis Decl. ¶ 3(D), Ex. A at 3. Lewen told Nienhuis that she had received a document entitled "Proposal For Academic Committee To Manage The San Quentin College Program" ("Inmates' Proposal"), which contained the inmates' complaints expressed at the earlier meeting. *Id.*

Dating back to December 2000, Nienhuis suspected illicit activities by two of the other inmates signing the

proposal with plaintiff. Nienhuis Decl. ¶ 3(F), Ex. A at 4. These two inmates had fostered inappropriate relationships with volunteers in another prison program. *Id.* In light of this history, Nienhuis was concerned about relationships between volunteers and the inmates in the College Program. *Id.* Plaintiff contends these two inmates were never found guilty of improper relationships in the earlier circumstances. Opp'n at 2.

On May 10, 2002, Nienhuis informed defendant Warden Woodford about the College Program situation. Nienhuis Decl. ¶ 3, Ex. A at 3. Woodford instructed Nienhuis to work with the Investigational Services Unit to investigate the signatories of the Inmates' Proposal for possible involvement in unauthorized activities. *Id.* Based on these instructions, beginning May 10, 2002, Nienhuis began an investigation into possible unauthorized activities of plaintiff and the three other signatories of the Inmates' Proposal. Nienhuis Decl. ¶¶ 1, 3; Ex. A at 1.

On May 13, 2002, plaintiff appeared in front of the Board of Prison Terms ("BPT"), which recommended that he be granted a parole date. Cattermole Decl. Ex. D. On May 15, 2002, Plaintiff's cell was searched pursuant to the College Program investigation. Nienhuis Decl. ¶ 4, Ex. A at 4. During the search, plaintiff's written materials were confiscated. *Id.* On May 28, 2002, the materials seized from plaintiff's cell were searched, yielding gambling materials, two pages of hardcore pornographic material printed from the internet, and additional loose magazine pages depicting hardcore pornographic material. Nienhuis Decl. ¶ 5, Ex. C at 43-44. On June 10, 2002, Nienhuis issued plaintiff a Rules Violation Report ("RVR") for possession of pornographic materials. Nienhuis Decl. ¶ 7, Ex. C at 43-44.

On June 11, 2002, plaintiff was placed on administrative segregation status out of concern that the recent RVR might affect plaintiff's behavior, given the potential impact of the RVR on plaintiff's recent recommendation for a parole date. Cattermole Decl. Ex. F. Three days later plaintiff appeared before an Institutional Classification Committee ("ICC") chaired by defendant Dacanay. Cattermole Decl. Ex. G. The ICC recommended that plaintiff remain in administrative segregation until adjudication of the RVR, in light of the potential for plaintiff to lose his parole date and out of concern for the safety and security of the facility in such an event. *Id.* Furthermore, the ICC referred the issue of extending the administrative segregation due to possible loss of plaintiff's parole date to the Classification Staff Representative ("CSR"). *Id.* On June 25, 2002, the CSR approved a 90 day administrative segregation extension due to the pending RVR and its potential impact on plaintiff's parole date. Cattermole Decl. Ex. G.

On June 28, 2002, a disciplinary hearing was held on plaintiff's RVR, chaired by defendant Williams. Williams Decl. ¶¶ 5-9; Nienhuis Decl. Ex. C. Plaintiff was given all pertinent documentation 24 hours prior to the hearing and at the hearing stated he was ready to proceed. Williams Decl. ¶¶ 5-9. At the hearing plaintiff entered a plea of not guilty, but admitted to possessing the hardcore pornographic material in question. *Id.*; Nienhuis Decl. Ex. C. Plaintiff was found guilty of "Possession of Obscene Material Depicting Anal and Vaginal Penetration and Bestiality" in violation of California Code of Regulations, Title 15, § 3006(c)(15)(C)(1) and (2), an administrative level offense. *Id.* The decision was based on three finding: (i) plaintiff admitted to possessing the material stated in

the RVR, (ii) the RVR was accurate and correct, and (iii) the material was contraband. *Id.*

Plaintiff claims he was not afforded sufficient due process. Opp'n at 3-4. He alleges that he was denied "the right to present documentary evidence in mitigation of the charges" and that the hearing officer "refused to accept documents in my defense," in violation of California Code of Regulations, Title 15, section 3329. ("The inmate may present documentary evidence in defense or mitigation of the charges.") *Id.*; *see also* Remeidio Compl. Claim I. Furthermore, plaintiff alleges Nienhuis withheld key evidence, because the hearing officer was not given the "letter and envelope containing the obscene materials." Remeidio Compl. Claim 1. Plaintiff does not state what "documentary evidence in mitigation of the charges" he wished to present, nor what "documents in my defense" might have been presented, except for the "letter and envelope containing the obscene materials."

On July 19, 2002, plaintiff appeared before a second ICC chaired by defendant Dacanay for review of plaintiff's administrative segregation. Cattermole Decl. Ex. I. The ICC noted that plaintiff had been found guilty of an RVR and that the Governor's Office was still reviewing his parole date. *Id.* The ICC concluded the plaintiff should be kept in administrative segregation, because if plaintiff's parole date was rescinded, he would pose a security threat as a possible escape risk. *Id.* Furthermore, the ICC referred the issue of transfer to more secure institution to the CSR. *Id.*

On or about July 26, 2002, defendant Nienhuis concluded his investigation into the College Program. Nienhuis Decl. ¶ 9, Ex. A at 39-40. Nienhuis concluded two of

the signatories on the Inmates' Proposal had engaged in inappropriate relationships with volunteers and had circumvented prison security by trafficking materials into and out of the institution. *Id.* Nienhuis found that there was insufficient information to find that plaintiff had engaged in inappropriate relationships or circumvented prison security. *Id.*

On July 31, 2002, the Board of Prison Terms Decision Review Unit recommended disapproval of the May 13, 2002 recommendation for a parole date. Cattermole Decl. Ex. J. On August 14, 2002, the BPT, sitting en banc, disapproved the May 13, 2002 recommendation for a parole date. Cattermole Decl. Ex. K.

On August 23, 2002, plaintiff appeared before an ICC, chaired by defendant Kane, for review of plaintiff's administrative segregation. Cattermole Decl. Ex. L. The ICC decided to continue plaintiff's administrative segregation, taking into account plaintiff's 90 day extension of administrative segregation, the BPT decision of August 14, and the pending disciplinary action for gambling. Cattermole Decl. Ex. L. Additionally, the ICC referred the case to the CSR to consider transfer to a more secure institution. *Id.*

On October 4, 2002, plaintiff appeared before an ICC chaired by defendant Wooten for review of plaintiff's administrative segregation. Cattermole Decl. Ex. N. The ICC recommended that plaintiff be transferred to a more secure institution. *Id.* This recommendation was based on plaintiff's two RVRs in recent months, his denial of parole, possible future denials of parole and because San Quentin was an older facility lacking modern security features. *Id.* On October 18, 2002, plaintiff was transferred from San

Quentin to California State Prison, Solano. Cattermole Decl. Ex. C.

Sometime between July 30, 2002 and August 27, 2002, plaintiff was issued an RVR for participating in a gambling pool based on gambling materials seized from plaintiff's cell on May 15, 2002. Cattermole Decl. Ex. M. Due to lack of evidence and failure to meet time constraints, sometime in September 2002 the gambling RVR was reduced to a CDC-128A Counseling Chrono, and plaintiff received a reprimand. *Id.*

On May 13, 2003, plaintiff, proceeding *pro se,* filed a complaint against Dacanay, Kane, Lemos, Nienhuis, Williams, Woodford and Wooten. Remeidio Compl. Claims 1, 2 and 3. Defendants' responded with a request for screening review under 28 U.S.C. § 1915A. Defs' Req. for Screening Review at 1. Pursuant to defendants' request, the Court issued an order on August 13, 2003 dismissing with leave to amend the claim for an equal protection violation, dismissing without leave to amend the claim based on administrative review, and dismissing defendant Lemos. Order of Dismissal with Leave to Amend at 7-8. On September 5, 2003, plaintiff filed an amendment to the equal protection claim, alleging a claim against Dacanay, Kane, Nienhuis, Woodford, and Wooten. Amendment to Compl. at 1-4.

Now before the Court is defendants' motion for summary judgment, filed February 20, 2004. Defs' Mot. for Summ. J. On February 23, 2004, prior to filing an opposition to the summary judgment motion, Charles Carbone was added as plaintiff's attorney. Notice of Appearance of Carbone at 1.

LEGAL STANDARD

The Court will grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (a fact is material if it might affect the outcome of the suit under governing law, and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Generally, as is the situation with defendants' challenge to the plaintiff's § 1983 claims, the moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 324. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by his own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* (citations omitted).

Where, as is the situation with a qualified immunity defense, the moving party bears the burden of proof at trial and must come forward with evidence which would entitle him to a directed verdict if the evidence went uncontroverted at trial. *See Houghton v. South,* 965 F.2d 1532, 1536 (9th Cir.1992). He must establish the absence of a genuine issue of fact on each issue material to his

affirmative defense. *Id.* at 1537; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248. When the defendant-movant has come forward with this evidence, the burden shifts to the non-movant to set forth specific facts showing the existence of a genuine issue of fact on the defense.

A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder v. McDonald,* 55 F.3d 454, 460 and nn. 10-11 (9th Cir.1995) (treating plaintiff's verified complaint as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746, plaintiff stated under penalty of perjury that contents were true and correct, and allegations were not based purely on his belief but on his personal knowledge). Here, the Court will consider as evidence Remeidio's verified Complaint, and his Amendment of Equal Protection Claim.

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). The evidence must be viewed in the light most favorable to the nonmoving party, and the inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *See id.* at 631.

Title 42 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (quoting 42 U.S.C.

§ 1983). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. *See Graham v. Connor,* 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins,* 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Ketchum v. Alameda County,* 811 F.2d 1243, 1245 (9th Cir.1987).

DISCUSSION

Defendants seek summary judgment on all of plaintiff's claims and to assert qualified immunity. Defs.' Mot. for Summ. J. at 1. As amended, plaintiff makes three claims under 42 U.S.C. § 1983 against the defendants. *See* Remeidio Compl. Claims 1, 2 and 3; *see also* Amendment to Compl. First, plaintiff makes an equal protection claim against defendants Nienhuis, Woodford, Kane, Wooten, and Dacanay based on alleged different treatment of Asian inmates by defendants. Amendment to Compl. at 4. Second, plaintiff makes a retaliation claim against defendants Woodford, Nienhuis, Dacanay, Kane, and Wooten based on alleged retaliation against plaintiff for signing the Inmates' Proposal. Remeidio Compl. Claim 2; *see also* Order of Dismissal with Leave to Amend at 5-6. Finally, plaintiff makes a due process claim against defendants Williams, Nienhuis and Woodford arising from the alleged denial of due process procedural protections during his disciplinary hearing for possession of pornographic material.

Remeidio Compl. Claim 3; *see also* Order of Dismissal with Leave to Amend at 3-4.

1. Plaintiff's equal protection rights were not violated

Plaintiff makes two arguments concerning his equal protection rights. Amendment to Compl. at 4. First, plaintiff alleges that defendants Nienhuis and Woodford singled out plaintiff, as one of three Asian signatories on the Inmates' Proposal, for punishment. *Id.* Second, plaintiff alleges defendants Woodford, Kane, Wooten, and Dacanay treated plaintiff differently than other inmates when they placed him in administrative segregation and transferred him to a different institution because of his race. *Id.* at 3-4.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (quoting *Plyler v. Doe,* 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

"Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (citation omitted). Invidious racial discrimination such as racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the necessities of prison security and discipline. *Cruz v. Beto,*

405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Johnson v. California*, 207 F.3d 650, 655 (9th Cir.2000).

A plaintiff alleging denial of equal protection under 42 U.S.C. § 1983 must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent. *See Monteiro v. Tempe Union High School Dist.*, 158 F.3d 1022, 1026 (9th Cir.1998). In addition, the claim must be rejected if the prison regulation or practice claimed to have infringed on an inmate's constitutional rights is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); *see also Washington v. Harper*, 494 U.S. 210, 223-25, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) (standard of review adopted in *Turner* applies in all circumstances in which needs of prison administration implicate constitutional rights, including when the constitutional right claimed to have been infringed is fundamental or a suspect class is involved).

A. Plaintiff fails to provide evidence showing defendants Nienhuis and Woodford acted with discriminatory intent or without legitimate penological goal

Plaintiff alleges that defendants Nienhuis and Woodford violated plaintiff's right to equal protection in their investigation of the Inmates' Proposal. Amendment to Compl. at 4. Plaintiff claims the three Asian inmates who signed the Inmate' Proposal were targeted for investigation and punishment. *Id.* at 3. Plaintiff was issued an RVR for possession of sexually explicit material, and later Woodford informed the BPT of the RVR, leading to denial of plaintiff's parole date. *Id.*

Plaintiff alleges Nienhuis and Woodford acted with discriminatory intent in choosing to investigate plaintiff and the other two Asian inmates who signed the Inmates' Proposal. *Id.* at 4. Plaintiff asserts that a group of other inmates found in possession of obscene contraband in the North Block where plaintiff is housed were not charged with an RVR, as plaintiff was. *Id.* at 3. Plaintiff believes that in the last five years no North Block inmate has been issued an RVR for possession of obscene material. *Id.* at 2. Furthermore, plaintiff states that only the three Asian inmates who signed the Inmates' Proposal were placed in administrative segregation, found guilty of rule violations, and transferred to different institutions. *Id.* at 3.

A claim for racial discrimination must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent. *See Monteiro,* 158 F.3d at 1026. Plaintiff's statements concerning enforcement of the ban on sexually explicit materials do not support plaintiff's allegations that Nienhuis and Woodford acted with intent to discriminate. Plaintiff does not allege that Nienhuis and Woodford were responsible for the prior enforcement decisions in the North Block. Furthermore, previous enforcement in the North Block does not address plaintiff's primary allegation that Nienhuis and Woodford treated plaintiff differently because he was Asian. Nonenforcement of the ban on pornography in the past, by unknown individuals, does not show intent to discriminate against Asian inmates and therefore has no evidentiary value.

Plaintiff argues Nienhuis and Woodford were targeting Asians by pointing out that only the three Asians who signed the Inmates' Proposal were found guilty of rule violations, placed in administrative segregation and

transferred. Amendment to Compl. at 3. In total, there were four inmates who signed the Inmates' Proposal. Decl. Nienhuis Ex. A at 3. Plaintiff alleges that three of the inmates who signed the proposal, including himself, were of Asian descent, and the fourth, plaintiff apparently alleges, was not of Asian descent. Amendment to Compl. at 3.

Woodford and Nienhuis authorized cell searches for all of the inmates involved in the Inmates' Proposal. Decl. Nienhuis Ex. A at 4. All four of the inmates had their cells searched and their written material confiscated. *Id.* Materials confiscated from the three Asian inmates led to charges being filed for improper relationships with volunteers, compromising institutional security, and, in the case of plaintiff, possession of contraband materials. *Id.* Ex. A at 37-40; Ex. C. Incriminating materials were not found in the fourth inmate's cell, and therefore no charges were filed. *Id.* Ex. A at 4.

Plaintiff's argument that Asian inmates were intentionally targeted for investigation and discipline does not have an evidentiary basis. Plaintiff's comparison with the North Block as a whole does not substantiate his claims that plaintiff was singled out as an Asian. The fact that only the Asian inmates who signed the Inmates' Proposal were issued RVRs is not evidence of differential treatment. The Asian inmates, including plaintiff, were found in possession of materials that led to disciplinary charges, while the non-Asian inmate was not in possession of such materials. Moreover, plaintiff does not dispute that the fourth inmate was not in possession of materials which could lead to disciplinary charges.

Defendants' motion for summary judgment points out plaintiff's failure to provide evidence supporting intent to discriminate against the Asian inmates. Defs.' Mot. for Summ. J. at 18-19. Once the moving party has pointed out the portions of the record which demonstrate the absence of a genuine issue of material fact, the burden shifts to the non-moving party to show a material fact at issue. *Celotex,* 477 U.S. at 324. As discussed above, plaintiff's Complaint and Amendment to Complaint do not provide evidence supporting intent to discriminate.

Furthermore, defendants point out there were legitimate non-discriminatory reasons for issuing RVRs to the three Asian inmates and not the fourth non-Asian inmate. The claim must be rejected if the prison regulation or practice is "reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89; *see also Washington,* 494 U.S. at 223-25. Plaintiff has provided no evidence that legitimate penological goals were not being pursued when the four inmates' cells were searched, and rule violations were issued to three of the inmates. Defendant has provided a record of the investigation which cites specific penological goals for the defendants actions. *See* Nienhuis Decl. Ex. A at 2-4.

Plaintiff has not carried his burden of proof, and the Court therefore GRANTS summary judgment to defendants on the issue of the equal protection violation by Nienhuis and Woodford.

B. Plaintiff fails to provide evidence showing defendants Woodford, Dacanay, Kane and Wooten acted with discriminatory intent or without legitimate penological goals

Plaintiff alleges defendants Woodford, Kane, Wooten and Dacanay violated plaintiff's equal protection by treating plaintiff differently than other inmates. Amendment to Compl. at 3-4. Plaintiff claims that Kane, Wooten and Dacanay targeted plaintiff for differential treatment, while they were chairing various ICC hearings on the plaintiff's administrative segregation and transfer. *Id.* Plaintiff alleges that only the three Asian inmates who signed the Inmates' Proposal were found guilty of rule violations, placed in administrative segregation, and transferred. *Id.* at 3.

Plaintiff supports his allegations by stating that no North Block inmate has been placed on administrative segregation for possession of obscene materials. *Id.* at 2. Other North Block inmates were given notice that sexually explicit material were contraband. *Id.* Furthermore, other inmates had been caught with sexually explicit materials and had not been placed in administrative segregation. *Id.* at 2-3. Plaintiff also asserts that prisoners similar to him were denied parole but did not receive administrative segregation or transfer. *Id.*

Plaintiff's allegations about prior discipline and administrative segregation in the North Block, even if true, do not support the essential element of intentional discrimination. Plaintiff does not allege that the prior decisions were made by the defendants. Nor does plaintiff allege other circumstances where Asian inmates have been treated differently. Furthermore, defendants contend that legitimate penological goals were advanced by their

actions, and have provided a record of the ICC hearings showing these goals. Defs.' Mot. for Summ. J. at 13; Cattermole Decl. F, G, I, L and N. Plaintiff bears the burden of showing no legitimate goal was advanced, but has not met it.

Plaintiff has not established an issue of material fact, and the Court therefore GRANTS defendants' motion for summary judgment on the equal protection claim against defendants Woodford, Dacanay, Kane and Wooten.

2. Plaintiff failed to establish a retaliation claim

Plaintiff makes two arguments that defendants retaliated against him. Remeidio Compl. Claim 2 and 3. First, plaintiff claims defendants Woodford and Nienhuis retaliated against his involvement in the Inmates' Proposal by searching his cell on May 15, 2002. Remeidio Compl. Claims 2 and 3; *see also* Order of Dismissal with Leave to Amend at 2. Second, plaintiff claims defendants Woodford, Dacanay, Kane, and Wooten placed plaintiff in administrative segregation as retaliation for plaintiff's involvement in the Inmates' Proposal, for filing a habeas corpus action in state court, and for challenging San Quentin's policy on the College Program. Remeidio Compl. Claim 2; *see also* Order of Dismissal with Leave to Amend at 2.

Retaliation by a state actor for the exercise of a constitutional right is actionable under 42 U.S.C. § 1983, even if the act, when taken for different reasons, would have been proper. *See Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 283-84, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Retaliation, though it is not expressly referred to in the Constitution, is actionable because retaliatory actions

may tend to chill individuals' exercise of constitutional rights. *See Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), the Supreme Court stated "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." In *Rizzo v. Dawson,* 778 F.2d 527, 532 (9th Cir.1985), the Ninth Circuit held, that for a prisoner to state a cause of action, "[plaintiff] must do more than allege retaliation because of the exercise of his First Amendment rights . . . ; he must also allege that the prison authorities' retaliatory action did not advance legitimate goals of the correctional institution or was not tailored narrowly enough to achieve such goals." Furthermore, plaintiff bears the burden of showing that there was no legitimate penological objective to defendants' actions. *Pratt v. Rowland,* 65 F.3d 802, 806 (9th Cir.1995) ("The plaintiff bears the burden of pleading and proving the absence of legitimate correctional goals for the conduct he complains of.").

Retaliation claims brought by prisoners must be evaluated in light of concerns over "excessive judicial involvement in day-to-day prison management, which 'often squander[s] judicial resources with little offsetting benefit to anyone.'" *Pratt,* 65 F.3d at 807 (quoting *Sandin v. Conner,* 515 U.S. 472, 482, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995)). In particular, courts should " 'afford appropriate deference and flexibility' to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." *Id.* (quoting *Sandin,* 515 U.S. at 482).

A. Plaintiff failed to provide evidence showing Woodford and Nienhuis acted without a legitimate penological goal

Plaintiff claims that on May 15, 2002, his cell was subject to a search in retaliation for his participation in the Inmates' Proposal, an exercise of his First Amendment rights. Remeidio Compl. Claim 3; *see also* Order to Dismiss with Leave to Amend at 2. He alleges that the search took place on Warden Woodford's orders, after Nienhuis brought the Inmates' Proposal to Woodford's attention. *Id.* Both Woodford and Nienhuis are named as the defendants responsible for this retaliation. *Id.*

Defendants argue that plaintiff has failed to provide evidence showing that a legitimate penological goal was not advanced by the search of plaintiff's cell. Defs.' Mot. for Summ. J. at 18-19. By pointing out a specific failure to create material issue of fact, defendants have shifted the burden to plaintiff to provide evidence creating a material issue of fact. *Celotex,* 477 U.S. at 324.

Plaintiff simply alleges that the search of his cell by Woodford and Nienhuis part of "a deliberate policy to exclude the expression of viewpoints and opinions that are unflattering or unwelcome." *See* Remeidio Compl. Claim 3. Plaintiff has not alleged or provided any facts suggesting that the search of his cell did not advance legitimate penological goals, as was his burden. Plaintiff's pleadings are considered a valid affidavit to oppose summary judgment, but the complaint does not establish facts within plaintiff's knowledge which create a material issue of triable fact.

Furthermore, defendants have provided significant evidence, in the form of Nienhuis's investigation report,

showing there were legitimate penological goals advanced by the search of plaintiff's cell. *See* Nienhuis Decl. Ex. A. Records show that an ongoing investigation was taking place when plaintiff's cell was searched. *Id.* at 4. The investigation was initiated partly because of the demands made in the Inmate Proposal, but also because of the prior records of the inmates involved and concerns of the College Program staff. *Id.* at 3-4. This investigation was pursued for the safety of the College Program volunteers, safety of the prison staff and security of the prison. Nienhuis Decl. ¶ 3(B). The search of plaintiff's cell was not retaliation, but part of an ongoing investigation undertaken for legitimate penological goals. Plaintiff has provided no evidence to refute the defendants' records. For the forgoing reasons, summary judgment is GRANTED on plaintiff's claims against defendants Woodford and Nienhuis for retaliatory search of his cell.

B. Woodford, Kane, Dacanay, and Wooten did not retaliate against the plaintiff because placement in administrative segregation advanced a legitimate penological goal

Plaintiff claims that he was retaliated against for his participation in the Inmates' Proposal, for filing a writ of habeas corpus in Marin County Superior Court, and for challenging prison policy. Remeidio Compl. Claim 2; *see also* Order of Dismissal with Leave to Amend at 2. Plaintiff alleges that in retaliation he was placed in administrative segregation and later transferred to another prison. *Id.* Plaintiff names defendants Woodford, Dacanay, Kane, and Wooten as the individuals responsible for the retaliation. *Id.*

Plaintiff does not detail what role Woodford played in the alleged retaliation, beyond ordering the search of plaintiff's cell discussed earlier. Dacanay, Kane and Wooten chaired various ICC hearings concerning plaintiff's placement in administrative segregation and his eventual transfer to another institution. *See* Cattermole Decl. F,G,I,LandN.

Defendants argue that plaintiff has failed to provide evidence that the actions by Woodford, Dacanay, Kane, and Wooten did not advance legitimate penological goals. Mot. for Summ. J. at 20. The only evidence provided was plaintiff's own assertion in the complaint recounting that Ms. Sorddragger told him that plaintiff was transferred because he signed the proposal. Remeidio Compl. Claim 2. Plaintiff's recounting of Ms. Sorddragger's statement may tend to support defendants' intent to retaliate, but does not establish that there was no legitimate penological goal advanced by the defendants' actions. By pointing out a specific failure to create material issue of fact, defendants have shifted the burden to plaintiff to provide evidence creating a material issue of fact. *Celotex,* 477 U.S. at 324. Plaintiff has failed to bear his burden of showing a material issue of fact that there was no legitimate penological goal advanced by the defendants actions.

Moreover, defendants have provided a record showing the ICC finding in question were made pursuant to legitimate penological goals, such as safety of staff and inmates, and the security of the institution. *See* Cattermole Decl. F, G, I, L and N. Plaintiff has failed to show that there is a triable issue of material fact on whether defendants' actions advanced legitimate penological goals. Therefore, for the above reasons the, Court GRANTS summary

judgment to the defendants on the charges of retaliation against Woodford, Dacanay, Kane, and Wooten.

3. Plaintiff's due process rights were not violated

Plaintiff claims his due process rights were violated at the June 28, 2002 ICC hearing, because he was denied "the right to present documentary evidence in mitigation of the charges" and the hearing officer "refused to accept documents in my defense"; and because Nienhuis withheld key evidence when the hearing officer was not given the "letter and envelope containing the obscene materials." Remeidio Compl. Claim 1. Plaintiff does not state what "documentary evidence in mitigation of the charges" he wished to present, nor what "documents in my defense" might have been presented, except for the "letter and envelope containing the obscene materials." Plaintiff does not dispute that he possessed the pornographic materials as charged in the RVR.

The Due Process Clause of the Fourteenth Amendment of the U.S. Constitution protects individuals against governmental deprivations of life, liberty or property without due process of law. Interests that are procedurally protected by the Due Process Clause may arise from two sources – the Due Process Clause itself and laws of the states. *See Meachum v. Fano,* 427 U.S. 215, 223-27, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

Prison disciplinary hearings may amount to a deprivation of a constitutionally protected liberty interest if two requirements are satisfied. *Sandin v. Conner,* 515 U.S. 472, 477-87, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). First, the liberty interest in question must be one of "real substance." *Id.* A liberty interest of "real substance" generally

means (i) a restraint that imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," or (ii) state action that "will inevitably affect the duration of [a] sentence." *Id.* at 484, 487. Second, the state statutes or regulations must narrowly restrict the power of prison officials to deprive the inmate of the liberty interest. *Id.* at 477-487; *see Bonin v. Calderon,* 77 F.3d 1155, 1161-62 (9th Cir.1996) (looking first to statutory language and finding no state-created constitutionally protected interest in choosing method of execution where state statute does not guarantee prisoner a choice).

In the absence of a liberty interest, an inmate's due process rights are violated in a disciplinary proceeding only if there is no evidence whatsoever supporting the disciplinary sanction. *See Burnsworth v. Gunderson,* 179 F.3d 771, 773-74 (9th Cir.1999).

A. Plaintiff fails to allege Woodford participated in the violation of plaintiff's due process rights

Plaintiff's due process claim alleges that Woodford denied plaintiff's request to have the RVR for possession of pornographic materials dismissed. Remeidio Compl. Claim 3. Plaintiff does not describe what due process was absent when this denial was issued, nor does plaintiff claim that Woodford was involved in the alleged due process violations that took place at the ICC on June 28, 2002. In Claim 1 of plaintiff's complaint, plaintiff alleges that Woodford participated in retaliation against plaintiff, but this is a separate cause of action already discussed. Remeidio Compl. Claim 1. The Court GRANTS summary judgment in favor of the defendants on the due process claim against Woodford.

B. Plaintiff's placement in administrative segregation subsequent to the June 28, 2002 ICC hearing was not an "atypical and significant hardship"

To invoke the Due Process clause, plaintiff must meet the first prong of the *Sandin* test by showing that a liberty interest of real substance was at stake at the hearing. *Sandin*, 515 U.S. 483-86. In *Sandin*, the Supreme Court held that placement in administrative segregation after a disciplinary hearing did not amount to atypical and significant hardship. 515 U.S. at 486. In that case plaintiff alleged that he was not provided the opportunity to present a witness at his disciplinary hearing, and plaintiff was subsequently placed in administrative segregation. *Id.* at 475. The Court held that the situation was not atypical and significant hardship, and therefore no liberty interest of real substance was at stake. *Id.* at 486. Because no liberty interest of substance was at stake, only minimal due process was necessary. *Id.*

Here, plaintiff argues that his situation differs from mere administrative segregation as described in *Sandin*, because the outcome of his June 28, 2002 disciplinary hearing led to revocation of his parole date and his transfer to a Level III facility. Remeidio Compl. Claim 1. A state action that "will inevitably affect the duration of [a] sentence" creates a liberty interest for the inmate. *Sandin*, 515 U.S. at 487.

Sandin addressed whether a disciplinary hearing having an effect on other administrative hearings gives rise to a liberty interest of real substance. *Id.* "The decision to release a prisoner rests on a myriad of considerations. And, the prisoner is afforded procedural protection at his parole hearing in order to explain the circumstances

behind his misconduct record. The chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause." *Id.* (citations omitted).

The *Sandin* analysis applies to plaintiff's parole denial and transfer to another prison facility. Plaintiff's parole and reassignment to a different facility were too attenuated to create a substantial liberty interest at the June 28th disciplinary hearing. Furthermore, plaintiff does not allege that his due process rights were denied at either his parole hearing or at the prison reassignment hearing.

Finally, in light of the interests at stake, the disciplinary hearing did not violate minimum due process standards. Plaintiff does not deny that he received notice of the hearing on the RVR, that he received all pertinent documentation 24 hours prior to the hearing, that he stated he was ready to proceed with the hearing when it was called, or that he was present during the hearing. Further, he does not deny the statement attributed to him at the hearing: "I had all the stuff they say I had but I do not feel it is contraband. I have had it a long time and no one said it was contraband in the past. I feel there is nothing wrong with it, therefore I'm not guilty." Nienhuis Decl. Ex. C. Although he now asserts that he was denied "the right to present documentary evidence in mitigation of the charges" and that the hearing officer "refused to accept documents in my defense," he appears to refer to the "letter and envelope containing the obscene materials," which would not have affected the outcome of the hearing.

Summary judgment is GRANTED in the defendants' favor on the issue due process violations by Nienhuis and Williams.

4. Qualified immunity

Defendants urge, in the alternative, that they are entitled to qualified immunity for their conduct. The defense of qualified immunity protects "government officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The rule of qualified immunity "'provides ample protection to all but the plainly incompetent or those who knowingly violate the law'"; defendants can have a reasonable, but mistaken, belief about the facts or about what the law requires in any given situation. *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (quoting *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). "Therefore, regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir.1991).

A court considering a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right, then proceed to determine if the right was "clearly established." *See Wilson v. Layne,* 526 U.S. 603, 119 S.Ct. 1692, 1694, 143 L.Ed.2d 818 (1999); *Conn v. Gabbert,* 526 U.S. 286, 290,

119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). The threshold question must be: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *Saucier,* 533 U.S. at 201; *see Martin,* 360 F.3d at 1082-1084. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. *Saucier,* 533 U.S. at 201.

On the other hand, if a violation could be made out on the allegations, the next sequential step is to ask whether the right was clearly established. *Id.* This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. *Id.* at 202. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.* If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *Id.* The plaintiff bears the burden of proving the existence of a "clearly established right."

In this case, summary judgment wil be granted to defendants because plaintiff has not established triable issues of material fact to warrant trial on his affirmative case. Alternatively, if a qualified immunity analysis were required, this Court would find that qualified immunity protects defendants since under the circumstances of this case it would not have been clear to reasonable officers that their conduct in performing plaintiff's cell search, in placing plaintiff in administrative segregation or in conducting the ICC hearing was unlawful. Accordingly,

summary judgment in favor of defendants is GRANTED on the claim for qualified immunity.

CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment are GRANTED. [Docket # 13]

IT IS SO ORDERED.

Dated: June 30, 2004

s/ _____
SUSAN ILLSTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROMIRICO REMEIDIO, Plaintiff-Appellant, v. J. WOODFORD; A. KANE; I. NEINHUIS; D. WOOTEN; H. WILLIAMS; D. DACANAY, Defendants-Appellees.	No. 04-16427 D.C. No. CV-03-02212-SI Northern District of California, San Francisco ORDER (Filed May 1, 2006)

Before: SILVERMAN, GRABER, and CLIFTON, Circuit Judges.

Defendants-Appellees' petition for rehearing is DENIED.

(3)

No. 06-167

FILED

SEP 12 2006

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN, ANTHONY P. KANE, H. WILLIAMS, D.A. DACANAY, AND I.A. NIENHUIS,

Petitioners,

v.

ROMIRICO REMEIDIO,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondent's only serious argument is that no conflict exists among the circuit courts. However, the circuits are in broad disagreement over how to handle inmate-retaliation claims. They conflict on: (1) whether an adverse action against an inmate can be challenged as retaliatory even though the action is objectively legitimate; and (2) if so, what standards for pleading and proof of retaliatory causation apply. (Pet. 7-10; Br. Amici States 1-4.) By taking this case, the Court will be able to resolve these persistent conflicts in a manner that is consistent with *Turner v. Safley*, 482 U.S. 78 (1987), and *Hartman v. Moore*, 126 S. Ct. 1695 (2006).

I. There Is Widespread Conflict Among the Circuits Over How Courts Should Address Inmate-Retaliation Claims.

Although the circuits vary widely over how to adjudicate inmates' retaliation claims, Respondent denies the existence of *any* conflict among the circuits. (Opp. 5-10.) His key argument contends that the Eighth Circuit does not bar inmates from challenging objectively legitimate discipline (discipline supported by some evidence) in conflict with the ruling below. *See Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994); *Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990). But the Eighth Circuit's rule is clear: when an inmate challenges a disciplinary violation as retaliatory, and there is "some evidence of the violation, the finding essentially checkmates his retaliation claim." *Henderson*, 29 F.3d at 469 (applying the some-evidence standard announced in *Superintendent v. Hill*, 472 U.S. 445 (1985), to hold that the retaliation claim failed). This is in stark contrast to the rule applied below,

which allows inmates to challenge objectively legitimate discipline as long as there is a dispute over the prison officials' subjective motive in administering the discipline.

In an attempt to explain away this conflict, Respondent contends that the Eighth Circuit's retaliatory-discipline cases, *Henderson* and *Orebaugh*, are distinguishable from the case here. (Opp. 6-7.) Specifically, he contends that the inmates' First Amendment expression in those cases was the same conduct for which they were disciplined, whereas Respondent was disciplined for conduct separate from the rules-violation charges. (Opp. 6-7.)

But Respondent's recitation of *Henderson*'s and *Orebaugh*'s facts is mistaken, regardless of Respondent's failure to show why such a difference would have eliminated the conflict. In *Henderson*, the inmate alleged that he was charged with assault in retaliation for requesting witnesses at a disciplinary hearing and reporting to the F.B.I. that prison officials harassed him. *Henderson*, 29 F.3d at 465-66, 469 (noting that the magistrate judge had denied the defendants' summary-judgment motion based on the inmate's contact with the F.B.I.). The inmate did not assert that his protected conduct was the assault itself; indeed, he disputed that he committed an assault. *Id.* at 466. And in *Orebaugh*, the inmate claimed that he was charged with violating a light-duty order in retaliation for filing a grievance about confiscated property. *Orebaugh*, 910 F.2d at 527. He did not allege that disobeying the light-duty order was protected conduct. Because the Eighth Circuit bars retaliatory-discipline cases if the

discipline was objectively legitimate, it squarely conflicts with the decision below.[1]

Respondent's argument also errs by contending that there is no real difference between the circuits that follow a burden-shifting standard (purportedly modeling the standard in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)), and those that follow a but-for test. (Opp. 9-10.) Here too, much of the argument is based on a misperception of the cases. For instance, he contends that *Peterson v. Shanks*, 149 F.3d 1140, 1144-45 (10th Cir. 1998), applied a but-for test in name only because it found "the retaliation claims to be wholly unsupported and 'speculative.'" (Opp. 10.) Although the court did state at one point that "Peterson's *remaining allegations* of retaliation are based on mere speculation," that was only after it analyzed several other retaliation claims under the but-for test in light of at least some evidence of retaliatory motive. *Id.* at 1143-45 (emphasis added) (noting the inmate's claim that the warden made explicit and menacing threats to him). Respondent also suggests that the First Circuit has not adopted the but-for test in *Layne v. Vinzant*, 657 F.2d 468 (1st Cir. 1981), because its reference to the test was mere dicta. (Opp. 9.) Respondent overlooks the case cited in *Layne*, *McDonald v. Hall*, 610 F.2d 16, 18-19 (1st Cir.

[1] The opposition also mistakenly cites *Cornell v. Woods*, 69 F.3d 1383 (8th Cir. 1995), for the proposition that the Eighth Circuit distinguishes between expressive conduct that violates prison rules and expressive conduct that does not. (Opp. 7.) *Cornell* makes no such distinction. But it does explain that the Eighth Circuit treats retaliatory-transfer cases differently from retaliatory-discipline cases. *Cornell v. Woods*, 69 F.3d at 1388-89. It addresses retaliatory-discipline cases under the some-evidence standard and retaliatory-transfer cases under the but-for test. *Id.*

1979), in which the First Circuit ordered the district court to apply the but-for test on remand.

In sum, the circuit conflict is widespread, as the petition and amici states explain. This Court's direction is needed to establish a single, uniform standard for inmate-retaliation cases that will eliminate the confusion among the lower courts and the disparity by which inmates' retaliation suits are decided across the circuits.

II. The Rule Applied Below Cannot Be Reconciled with *Turner v. Safley* or *Hartman v. Moore*.

A. *Turner v. Safley* Permits Objectively Reasonable Restrictions on Inmate Expression Regardless of Whether the Restrictions Are Imposed by a Prison Regulation or an Official's Independent Conduct.

The rule applied below conflicts with *Turner v. Safley*, 482 U.S. 78 (1987), because it allows inmates to challenge objectively legitimate state actions simply by casting doubt on the state actor's motivation. *Turner* does not instruct courts to fixate on officials' subjective motivations; instead, it tells courts to examine whether there is a "logical connection between the regulation and the asserted goal." *Id.* at 89. If the restriction is objectively reasonable, it withstands the test and is constitutional. *Id.*

Respondent tries to reconcile the decision below with *Turner* by positing that *Turner* applies only when an inmate's constitutional rights are restricted directly by a prison rule or regulation, not by an official's action apart from a regulation. (Opp. 11.) But this Court "made quite clear that the standard of review [it] adopted in *Turner* applies to all circumstances in which the needs of prison

administration implicate constitutional rights." *Washington v. Harper*, 494 U.S. 210, 224 (1990). *But cf. Johnson v. California*, 543 U.S. 499 (2005) (holding that strict scrutiny applies to inmates' racial-discrimination claims). Thus, the courts of appeals have not hesitated to apply *Turner* to cases in which officials' conduct – rather than a regulation – is challenged. *E.g., Phelps v. Dunn*, 965 F.2d 93, 98-100 (6th Cir. 1992) (analyzing under *Turner* a homosexual inmate's claim that the prison chaplain and deputy warden excluded him from leadership roles in religious services); *Ali v. Dixon*, 912 F.2d 86, 89-91 (4th Cir. 1990) (holding under *Turner* that an inmate's religious rights were not violated when officers failed to call him by his newly adopted Muslim name).

It is true that this Court has only had opportunities to apply the *Turner* standard to cases in which prison rules or regulations were challenged. *E.g., Beard v. Banks*, 126 S. Ct. 2572 (2006) (reviewing restriction on high-security inmates' access to newspapers, magazines, and photographs); *Overton v. Bazetta*, 539 U.S. 126 (2003) (addressing prisoner-visiting regulations); *Shaw v. Murphy*, 532 U.S. 223 (2001) (considering regulation of inmate communication). But this is not surprising, since regulations control nearly every aspect of prison operations, and most inmate restrictions are thereby related to some rule or policy. Regardless, the Court's purpose in *Turner* was to establish a generally applicable legal standard. *Turner*, 482 U.S. at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." (internal quotation marks and citation omitted)). And this Court permitted objectively reasonable

restrictions on inmates' constitutional rights, thereby barring inmates from challenging reasonable restrictions by calling into question the officials' subjective motivations.

B. The Court's Rationale in *Hartman v. Moore* Counsels that Objective Reasonableness Should Be the Standard in Inmate-Retaliation Cases.

The decision below is also at odds with *Hartman v. Moore*, 126 S. Ct. 1695 (2006), which holds that if a criminal prosecution is objectively reasonable – that is, supported by probable cause – it cannot be challenged as retaliatory. The opposition attempts to discount *Hartman*'s significance simply by stating that it is not a inmate-retaliation case. (Opp. 11.) But this misses the point.

Unless inmate-retaliation cases are subject to an objective-reasonableness standard like retaliatory-prosecution cases, an odd incongruence occurs. Under *Hartman*, a free citizen who is charged with a criminal violation but later acquitted is barred from pursuing a retaliation claim as long as the criminal charge was objectively reasonable. *Hartman*, 126 S. Ct. at 1707. Yet under the rule applied below, a prisoner who is not only charged with, but also convicted of violating a prison rule, can challenge the conviction as retaliatory despite its objective legitimacy.

This incongruence transfers to the respective officers as well. The officer on the street who induced the criminal prosecution has his decision reviewed for objective reasonableness. *Id.* But the correctional officer who files disciplinary charges against a prisoner has his subjective motives probed regardless of how reasonable his action was –

indeed, even when the charges resulted in a conviction. This inconsistency is exacerbated by the fact that inmates are not limited to impugning officers' motives only when they are charged with a rules violation. Rather, they can bring retaliation suits nearly any time officers take adverse action against them. *E.g.*, *Morris v. Powell*, 449 F.3d 682, 685-86 (5th Cir. 2006) (holding that an inmate may bring a retaliation claim for any adverse action that would chill an inmate of ordinary firmness from exercising First Amendment rights in the future).

Such a result does not square with *Hartman*'s rationale. The Court explained in *Hartman* that in order to show causation in a retaliatory-prosecution case, the plaintiff must overcome the presumption of legitimacy that is afforded to prosecutorial decisions. *Hartman*, 126 S. Ct. at 1706. And it is appropriate to require the plaintiff to do this by showing a lack of probable cause because there is ordinarily ample evidence demonstrating whether probable cause existed. *Id.* at 1706. Likewise, this Court affords a high presumption of legitimacy to prison administrators' decisions because of the intractable challenges they must address. *Turner*, 482 U.S. at 84-85; *see also Hewitt v. Helms*, 459 U.S. 460, 474 (1983) (describing how administrators must be wary of subtle security threats that have potentially disastrous consequences). And also similar to the retaliatory-prosecution context, there exists a ready body of evidence to demonstrate whether there was a reasonable basis for adverse action against an inmate. Prisons keep their own extensive records, and under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prisoners must exhaust their administrative remedies before filing suit, creating even more-detailed documentation concerning the adverse action.

For these reasons, prisoners who bring retaliation claims should be required to plead and prove an absence of objective reasonableness in the same way that retaliatory-prosecution plaintiffs must plead and prove a lack of probable cause.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Dated: September 12, 2006

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FILED
SEP 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-167

IN THE

Supreme Court of the United States

JEANNE WOODFORD, DEWEY WOOTEN, ANTHONY P. KANE, H. WILLIAMS, D.A. DACANAY, AND I.A. NIEHUIS,
Petitioners,

v.

ROMIRICO REMEIDIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF INDIANA, ALABAMA, ALASKA, ARIZONA, COLORADO, DELAWARE, GEORGIA, HAWAII, IDAHO, ILLINOIS, MICHIGAN, MONTANA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA, and WYOMING AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Can an inmate's First Amendment retaliation claim survive summary judgment when the inmate cannot prove that there was no objectively legitimate penological reason for the government action?

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INTEREST OF *AMICI CURIAE*

Over 91% of all inmates in the United States are in state or local custody. *See* Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2004*, at 2 (Table 1) (Apr. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf (last visited Aug. 29, 2006). Purely as a matter of opportunity, every negative statement from an inmate to or about a guard may plant the seed for a First Amendment retaliation claim in the event of later disciplinary action against the inmate. At the same time, prisons are dangerous places for prisoners and guards alike, and they can be made safer only by strict enforcement of prison rules. The *amici* states therefore have a compelling interest in ensuring that guards and other prison officials may enforce prison rules when justified by legitimate penological interests without fearing that their motives will ultimately be put on trial.

REASONS FOR GRANTING THE PETITION

I. Prison Guards in Many States Face Unpredictable Odds Resisting First Amendment Retaliation Claims While Those in Other States Need Not Fear Having Their Motives Second-Guessed

A. A deep circuit conflict demonstrates judicial uncertainty over how to handle prisoners' First Amendment retaliation claims

Federal appellate decisions in prisoner-retaliation cases are all over the board with regard to both outcome and reasoning. At one end of the continuum is the Ninth Circuit, which permits a trial over retaliatory motive as long as the prisoner disputes that enforcement of prison rules was undertaken in good faith. *See* Pet. 8; *see also Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) ("[P]laintiff has alleged that [the prison official's] actions were retaliatory

and were arbitrary and capricious. He has thereby sufficiently alleged that the retaliatory acts were not a reasonable exercise of prison authority and that they did not serve any legitimate correctional goal."). At the other end of the continuum is the Eighth Circuit, which ignores subjective motivations and simply asks whether there is an adequate evidentiary basis for the disciplinary action—essentially an objective search for any legitimate justification. *See Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994); *see also Byrd v. Moseley*, 942 F. Supp. 642, 645 (D.D.C. 1996) (placing the burden on the plaintiff to show not only that retaliation was a substantial or motivating factor, but also that the retaliatory action did not advance legitimate penological goals).

Other courts apply standards somewhere in the middle. The Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits consider evidence of actual motive, but use the burden-shifting analysis of *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), to allow prison officials to overcome a showing of improper motive with evidence that the punishment would have been imposed regardless. *See Graham v. Henderson*, 89 F.3d 75, 79-80 (2d Cir. 1996); *Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993); *Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir. 1999); *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996); *Adams v. Wainwright*, 875 F.2d 1536, 1537 (11th Cir. 1989) (declining "to adopt the 'but for' standard" because it places a greater burden of proof on the prisoner); *see also Curtis v. Solomon*, 2006 WL 1653354, at *18 (N.D. Fla. 2006) (applying *Mt. Healthy* and stating that "it is beneficial to maintain uniformity of analysis of First Amendment retaliation claims").

Meanwhile, the First, Fifth, and Tenth Circuits definitively tax the prisoner to establish but-for causation. *See*

McDonald v. Hall, 610 F.2d 16, 18-19 (1st Cir. 1979); *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995); *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998).

As the Petition outlines with respect to the Ninth Circuit, *see* Pet. 8-9, even cases within circuits demonstrate confusion and inconsistency. For example, while the Seventh Circuit's *Babcock* decision adopts the *Mt. Healthy* burden-shifting standard, requiring the government to disprove but-for causation, the court at times uses *Babcock* to require prisoners to prove both the existence of a retaliatory motive and its but-for relationship to the alleged retaliatory action. *See, e.g.*, *Dejesus v. Edgar*, 1998 WL 171272, at *2 (7th Cir. 1998) ("To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, [plaintiff] must allege a chronology of events from which retaliation may be inferred. Moreover, [plaintiff] must show that he would [not] have been placed in protective custody were it not for the fact that he filed lawsuits against prison officials and served as a prison litigator.").

These standards are fundamentally incompatible and lead to different litigation burdens, settlement incentives, and judicial results for prison officials of different states. Given the same set of facts, a prison guard in the Second Circuit will likely have more incentive to settle than one in the Eighth Circuit, but less than one in the Ninth Circuit, where nearly any prisoner-retaliation claim with some modicum of evidentiary support may be tried. As important, these different standards may translate into different levels of vigilance when it comes to enforcing prison rules. Prison guards in several pro-prisoner circuits, particularly the Ninth Circuit but also the Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits, may be more easily deterred from disciplining inmates known to have filed grievances because they are sitting ducks for burdensome and unpredictable

retaliation claims. Meanwhile, guards in the Eighth Circuit may be confident that their legitimate enforcement judgments will survive scrutiny even if an offending inmate has recently filed a grievance.

The lower courts plainly have not reached and will not reach a consensus on a proper, consistent standard for First Amendment retaliation claims. With all eleven regional circuits that govern states having attempted to divine the proper standard, there is little point in allowing the issue to percolate any further. The Court should step in now and settle this deep conflict.

B. The standard for retaliation claims has real-world litigation consequences of a potentially vast scope

It is no secret that inmates generate an enormous volume of civil-rights litigation: For the year ending September 30, 2005, 16,005 prisoner-civil-rights complaints were filed in federal court, a 3.4% increase from 2004. *See* Annual Report of the Director, *Judicial Business of the United States Courts*, at 162 (Table C-2A) (2005), *available at* http://www.uscourts.gov/judbus2005/appendices/c2a.pdf (last visited Aug. 29, 2006). Neither the federal government nor many states systematically collect data concerning First Amendment retaliation claims, but it nonetheless appears that a significant percentage of prisoner cases include such claims. For example, in 2005, California state officials were sued in 61 new federal prisoner-civil-rights cases alleging retaliation, and in the first six months of 2006, California officials have already been sued in 36 new retaliation cases. Even a small state such as Indiana has seen over 15 new retaliation cases filed by prisoners in state and federal court since 2005 and nearly 40 since 2003.

The conflicting and unpredictable standards that swirl about the country have a real impact on how states litigate

the rafts of retaliation claims they face each year, as a couple of cases illustrate. In *Smith v. Davis*, No. 3:02-CV-0233-PS, Docket No. 145 (N.D. Ind. July 14, 2004), where a prisoner who filed a grievance was confined in administrative segregation after he physically assaulted another inmate, the court upheld a jury's award of punitive damages based on the prisoner's testimony that a guard said "he would get him for filing the grievance." *Id.* at 7. Thus, an allegation of a single hot-headed statement from one guard was enough to defeat an undisputed compelling penological justification for discipline. Prison officials likely would have prevailed under the standards imposed by the First, Fifth, Eighth, and Tenth Circuits. Within the Seventh Circuit, however, the punitive-damages verdict may encourage prisoner-retaliation claims even where there is undisputed prisoner misconduct.

Similarly, in *Armstead v. Clark*, No. TH 02-40-C-M/F, Docket No. 92, Entry Discussing Pending Motions, (S.D. Ind. Nov. 30, 2004), an inmate threatened a guard in a grievance and the same day was formally reported for doing so. The court said that the prisoner could not prevail "unless he establishes that the challenged action would not have occurred 'but for' the constitutionally protected conduct," yet permitted the case to proceed to trial simply because the prisoner disputed "the defendant's reason for writing the conduct report." *See id.* at ¶2d. After a bench trial, the court entered judgment for the guard. *See Armstead v. Clark*, 2006 WL 2373241, at *3 (7th Cir. 2006) (affirming). Summary judgment, however, was defeated not by any serious evidence of retaliation, but by a clever prisoner's use of the grievance procedure to simultaneously threaten a guard and lay the groundwork for a plausible inference of retaliatory motive when he was punished for the threat. Moreover, the court was so uncertain how to apply the doctrine that it did not even hold the prisoner to the but-for standard that the court thought should apply (but which appears to have been contrary to *Babcock* in any event). *But see McClain v.*

Leisure, 2006 WL 2468545, at *6-7 (7th Cir. 2006) (*granting* summary judgment to a prison guard who issued a conduct report against a prisoner for making false statements in a grievance because there was no evidence to support the contention of retaliatory motive).

II. The Rule Applied in the Decision Below Conflicts with *Turner v. Safley* and Fails to Give Proper Deference to Prison Officials

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court, upholding a rule restricting inmate correspondence, announced a legal standard for prisoners' constitutional claims "that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" *Id.* at 85. Under *Turner*, a prison rule will be upheld if it is "reasonably related to legitimate penological interests." *Id.* at 89. This standard is significant here for two reasons.

1. First, under the *Turner* standard, it makes no difference whether the government's legitimate interests are mere pretexts and the rule at issue results from some retaliatory motive on the part of prison officials. *See id.* at 89. Under the standard articulated by the decision below, however, if an inmate so much as alleges that the rule or regulation was applied to him in retaliation for exercise of his First Amendment rights, the inmate is entitled to a jury trial concerning the validity of the action. *See* Pet. 6.

In other words, absent a retaliation claim, courts analyze prison restrictions impinging constitutional rights only for bare legitimacy. However, in the Ninth Circuit's view, if an inmate alleges that otherwise legitimate enforcement of a legitimate rule was undertaken in retaliation against his exercise of First Amendment rights, courts must then examine the officials' motives. Neither the Ninth Circuit, nor

any other lower court, however, has explained why prisoners' First Amendment retaliation claims are entitled to more searching review than prisoners' other First Amendment claims. *See Beard v. Banks*, __ U.S. __, 126 S. Ct. 2572, 2578 (2006) (applying *Turner* to a prisoner's First Amendment challenge to a prison rule).

Prison rules help bring order and safety to a chaotic and insecure environment. Prison guards must be able to enforce these rules so long as there is an objectively reasonable basis for doing so. Relationships between prisoners and guards are often contentious, but general bad feelings are part of the nature of prison life and should be irrelevant in determining whether a prisoner was subjected to unlawful First Amendment retaliation. Subjective inquiries into motivation are unpredictable, and prison guards cannot adequately prepare airtight defenses, no matter how pure their personal motivations. Prison guards usually can, however, prove an objectively legitimate basis for enforcing a prison rule—if one exists—and such evidence ought to be enough to defeat a retaliation claim in this particular setting. *Cf. Hartman v. Moore*, __ U.S. __, 126 S. Ct. 1695, 1704 (2006) (holding that probable cause defeats retaliatory prosecution claims in part because there is a "distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge").

2. Second, the Ninth Circuit's rule also fails to give due deference to the judgment of prison officials. In *Turner*, the Court recognized that "'courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform'" and "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of

government." *Turner*, 482 U.S. at 84-85. The Court "accord[s] substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *cf. Hartman*, 126 S. Ct. at 1706 (proceeding from the "presumption that a prosecutor has legitimate grounds for the action he takes").

The Ninth Circuit's standard contravenes these principles and enables inmates to use speech to immunize themselves from the enforcement of prison rules. If an inmate can simply file a grievance, violate the rules, and then assert a triable federal claim that resulting discipline is illegal retaliation, grievances may well create bubbles of protection for prisoners clever enough to use grievances as weapons.

Furthermore, only in prisons, government employment, and a few other contexts can ordinary, everyday conversations prompt government action threatening First Amendment rights. *See Amatel v. Reno*, 156 F.3d 192, 195-96 (D.C. Cir. 1998). In these contexts, a class of subordinate individuals must constantly interact with a class of government supervisors whose actions may form the predicate for constitutional claims. Some mode of deference to government officials is even more necessary in these contexts because every communication may become, or at least plant the seeds for, a federal case. *See id.* (observing that prisons, public schools, the military, and government workplaces demand "regulation more intrusive than what may lawfully apply to the general public").

The mode of deference in government employment cases relates to the content of employee speech. The government has an interest in "promoting the efficiency of the public services it performs through its employees," so

government employee speech is protected only as to "matter[s] of public concern." *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968). If the speech relates in any way to official duties, courts defer to the legitimate judgments of government employers. *See Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, 1960 (2006).

The speech of prison inmates, however, is not similarly divisible into categories of protected and unprotected speech. As with ordinary citizens who are not government employees, there is no requirement that inmate speech touch a matter of public concern to be protected by the First Amendment. *See Thaddeus-X*, 175 F.3d at 391 ("No circuit has held that the . . . public concern limitation applies to prisoners' speech."). Under standards such as that applied in the decision below, therefore, nearly all speech or expressive conduct by an inmate can become the basis for a First Amendment retaliation claim.

To check that possibility, the same deference that courts ordinarily pay to prison officials in response to prisoners' constitutional claims should impose a brake on retaliation claims as well. Rejecting prisoners' retaliation claims where a legitimate penological interest supports the government action would prevent prisoners from using every conversation to set up prison guards and other officials for retaliation claims. It would also eliminate the apparent inferiority of government employees relative to prisoners as First Amendment retaliation plaintiffs. Regardless, the Court should grant the petition to examine this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Dated: September 1, 2006